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No. 90-1249

In The Supreme Court of the United States

OCTOBER TERM, 1990

R. R. DONNELLEY & SONS COMPANY,
Petitioner,

v.

JUDY PREVOST, GERALD KOLINSKY, Compensation Commissioner, Eighth District, State of Connecticut; JOHN A. ARCUDI, Chairman, Board of Compensation Commissioners, State of Connecticut; RICHARD BLUMENTHAL, Attorney General, State of Connecticut,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Respondents attempt to avoid ERISA preemption of Conn. Gen. Stat. § 31-284b (1989)("section 31-284b"), despite the state law's relationship to ERISA-covered plans, by presenting a series of misdirected and erroneous arguments. Their most significant

misconception takes the form of an analogy between section 31-284b and the New York Disability Benefits Law ("DBL")[1] that was upheld in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). According to respondents, this Court found in *Shaw* that the DBL "related to" ERISA-covered plans. Respondents' Brief in Opposition ("Res. Br.") at 4, 7. To the contrary, *Shaw* upheld the DBL precisely because the benefit plans to which it related were exempt from ERISA coverage.

Respondents' many other misconceptions demonstrate the weakness of the case in favor of this statute, and highlight the need for certiorari. Moreover, a new law in the District of Columbia further illustrates the threat of inconsistent local regulation of ERISA-covered plans. This law requires employers to provide equivalent health insurance coverage for up to one year to employees who are eligible to receive workers' compensation. 37 D.C. Reg. 6890 (D.C. Code § 36-307(a-1)(1990)) (Reply Appendix at RA1). Thus, a patchwork scheme of differing state burdens on sponsors of interstate benefit plans has already begun to emerge with respect to welfare benefits for certain employees. This Court should grant its Writ of Certiorari to carry out the Congressional objectives underlying ERISA.

A. Respondents' Opposition To The Petition Is Based Upon A Series Of Misconceptions

1. Misconception: *Shaw* held that the New York "Disability Benefits Law 'related to' ERISA-covered employee benefit plans"[2]

ERISA preempts state laws that relate to benefit plans covered by ERISA; it does not preempt laws relating to exempt plans, which fall outside of ERISA's coverage. ERISA § 514(a), 29 U.S.C. § 1144(a)(Pet. App. at A54). This straightforward provision creates a

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[1] N.Y. Work. Comp. Law §§ 200-242 (McKinney 1965 and Supp. 1982-1983).
[2] Res. Br. at 7-8.

problem for respondents because section 31-284b undeniably relates to petitioner's[3] ERISA-covered plans. To avoid this problem, respondents claim this Court found in *Shaw* that the DBL related to ERISA-covered benefit plans. Res. Br. at 7-8. *Shaw*, however, contains no such finding. Respondents' significant misreading of *Shaw*, like the Second Circuit's opinion in the instant case, would turn the law of ERISA preemption on its head.

In *Shaw*, this Court observed that the DBL related to "benefit plans." *Shaw*, 463 U.S. at 96-97. Contrary to respondents' misreading, however, *Shaw* did not hold that the DBL related to benefit plans covered by ERISA. Indeed, *Shaw* held that the DBL related exclusively to benefit plans that were *exempt* from ERISA under § 4(b)(3), 29 U.S.C. § 1003(b)(3) (Pet. App. at A52). *Shaw*, 463 U.S. at 106-08 (holding the DBL was not preempted, after observing that "while the [DBL] plainly is a state law relating to employee benefit plans, it is not preempted if the plans to which it relates, are exempt from ERISA under § 4(b)"). This Court rejected the employer's argument in *Shaw* that the DBL "related to" its ERISA-covered plan because the employer had elected to pay disability benefits through its ERISA-covered plan.

Unlike the DBL, section 31-284b relates to benefit plans covered by ERISA. Accordingly, under *Shaw* and every other Supreme Court case on ERISA preemption, section 31-284b is preempted.

2. Misconception: "Neither the nature nor the level of the mandated benefits . . . is relevant to the question of preemption under the *Shaw* analysis"[4]

Shaw did not create a new or special analytical approach to ERISA preemption. Like other cases, *Shaw* focused on whether the challenged statutes related to plans covered by ERISA. With respect

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[3] *See* Petition for A Writ of Certiorari, List of Parties at ii, identifying petitioner's subsidiaries.

[4] Res. Br. at 11.

to the DBL, the nature and level of mandated benefits did not relate to ERISA-covered plans.[5] The nature of the obligation imposed by the other statute at issue in *Shaw* — the Human Rights Law, which prohibited discrimination in benefits on the basis of pregnancy — did relate to ERISA-covered plans and, thus, was preempted. *Shaw*, 463 U.S. at 100-06. *Shaw's* approach was consistent with *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), which rejected an attempt to regulate pension benefits under the guise of a so-called workers' compensation law. Accordingly, when the nature and level of benefits mandated by a state law, such as section 31-284b, relate to ERISA-covered plans, the state law is preempted. *Ingersoll-Rand Co. v. McClendon*, __U.S.__, 111 S. Ct. 478, 483-84 (1990) (ERISA preempts state law obligations premised upon ERISA-covered plans).

3. Misconception: Section 31-284b is a "workers' compensation statute" because it measures "income" lost while the employee is out of work[6]

Without explaining the significance of their claim, respondents assert that section 31-284b is a "workmen's compensation law" and stress that it measures the lost "income" of inactive employees. Res. Br. at 5. Under a more accurate, functional definition, section 31-284b is really a "benefit plan law" because it regulates only those employers who sponsor benefit plans. Since workers' compensation laws enjoy no general exemption from ERISA preemption,[7] the characterization of section 31-284b as a "workers'

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[5] The DBL mandated benefits based upon the lesser of a flat sum or the employee's weekly wages, 463 U.S. at 89-90, both of which fall outside of ERISA. ERISA § 3(1), 29 U.S.C. § 1002(1) (Pet. App. at A51); 29 C.F.R. § 2510.3-1(b)(1)(1990)(Pet. App. at A55). Moreover, the employer in *Shaw* did not challenge the nature or level of the wage continuation mandated by the DBL. Thus, it is somewhat disingenuous for the Respondents to declare that *Shaw* set forth an analytical framework under which the nature and level of benefits mandated by a state law are irrelevant to ERISA preemption.

[6] Res. Br. at 5.

[7] ERISA § 4(b)(3) exempts from ERISA plans established solely to comply with applicable workers compensation laws; it does not exempt all workers'

compensation law" gains Connecticut nothing. That Connecticut chose to define "income" in relation to benefit plans for active employees merely begs the question of whether ERISA preempts this statute.[8]

The controlling issue is whether section 31-284b relates to ERISA-covered plans. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 523-25 ("[i]t is of no moment that [the state] intrudes indirectly through a workers' compensation law, rather than directly, through a statute called 'pension regulation'"). ERISA preempts section 31-284b because it determines the benefits that an employer must provide to inactive employees by reference to the level of benefits provided to the employer's active employees through ERISA-covered plans.

4. Misconception: Section 31-284b does not target sponsors of ERISA-covered plans because it also applies to churches and governments[9]

Respondents note correctly that section 31-284b affects not only sponsors of benefits plans covered by ERISA but also churches and governments, whose plans are exempt from ERISA. Res. Br. at 6-7 (citing ERISA § 4(b)(1),(2), 29 U.S.C. 1003(b)(1),(2)). Thus, like any other state law that ERISA preempts, section 31-284b could continue in effect with respect to church and governmental plans. ERISA § 514(a), 29 U.S.C. § 1144(a). The inclusion of exempt,

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(footnote continued)
compensation laws. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 & n.20 (1981).

[8] Under respondent's view of "workers' compensation laws" and "income," States are free to require employers who make pension contributions on behalf of active employees to make up for the pension contribution "income" lost by inactive employees who are eligible to receive workers' compensation. Similarly, respondents would allow states to require that employers make up for pension contribution "income" lost due to unemployment or disability. *See* ERISA § 4(b)(3).

[9] Res. Br. at 6-7.

church and governmental plans, however, does nothing to cure the relationship between section 31-284b and ERISA-covered plans maintained by private, secular employers, such as the petitioner. Among private, secular employers, section 31-284b targets only those who provide welfare benefits to their active employees — i.e. ERISA plan sponsors.

5. Misconception: *Stone* held that the statutory predecessor to section 31-284b was preempted solely because it required compliance through ERISA-covered plans[10]

Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 420 (1983), held as follows:

> We conclude . . . that section 31-51h of the General Statutes of Connecticut constitutes a forbidden state encroachment on a private employee benefit plan. Its only purpose is to add an additional statutory requirement — the cost of which is to be borne by the employer — to a private employee benefit plan. Thus, the state statute relates to an employee benefit plan as defined by ERISA and must be construed as preempted by 29 U.S.C. § 1144(a).

690 F.2d at 329.

Thus, the court in *Stone* did not, as the Respondents would have it, base its holding upon the absence of alternative means for an employer to carry out the additional statutory requirement. Rather, the court found preemption because that state law related to and burdened ERISA-covered plans.

Neither ERISA's language nor the rationale in *Stone* limits preemption to laws that require compliance through ERISA-covered

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[10] Res. Br. at 9.

plans. A plan sponsor's option to set up a separately administered plan to comply with a state-imposed obligation does not negate that obligation's relationship to the ERISA-covered plan. *See Ingersoll-Rand*, 111 S.Ct. at 483-86 (state common law cause of action based upon the existence of a pension plan is preempted despite the fact that the plaintiff did not seek to recover benefits under the pension plan). *Shaw* merely observed that if an employer elected to provide disability benefits through an ERISA-covered plan, the state could not regulate that plan, but could require establishment of a separate plan to assure compliance with the mandated benefits. Thus, section 31-284b's options for compliance do not save it from ERISA preemption.

6. Misconception: Section 31-284b does not intrude on an employer's initial decision to provide ERISA benefits[11]

Respondents rely upon the District Court's flawed view that section 31-284b does not affect employers' initial decisions to provide welfare benefits to their active employees. This observation, which the Second Circuit did not endorse, is obviously wrong. This Court has more accurately perceived that state-generated burdens on sponsors of ERISA-covered plans encourage employers to reduce or eliminate benefits. *E.g.*, *FMC Corp. v. Holliday*, ____ U.S. ____, 111 S.Ct. 403, 408 (1990); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987). Moreover, even if the District Court were correct, nothing limits the reach of ERISA preemption to state laws that affect employers' initial decisions to provide benefits.

7. Misconception: Congress reserved to the States the area of workers' compensation.[12]

Congress preserved from ERISA preemption state laws regulating banking, insurance, and securities. ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). The exemption in

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[11] Res. Br. at 6.

[12] Res. Br. at 11-12.

ERISA § 4(b)(3) for plans maintained solely to comply with applicable workers' compensation laws does not authorize states to pass workers' compensation laws that relate to ERISA-covered plans. *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. at 523 & n.20. The failure of Connecticut and other states to appreciate this distinction produces laws like section 31-284b, which burden ERISA plans and their sponsors.

B. The Danger Of Inconsistent Burdens On ERISA Plan Sponsors Is Real

In its initial brief, petitioner warned of the danger of laws like section 31-284b, which piggyback onto ERISA-covered plans. A new law that became effective March 6, 1991 in the District of Columbia further illustrates this threat.

D.C. Code § 36-307(a-1)(1)(1990) provides as follows:

> "Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this act."

Reply App. at RA1.

The new law in the District of Columbia, like section 31-284b, imposes additional obligations on employers who sponsor ERISA-covered benefit plans for their active employees.[13] Under

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[13] Other sections of the D.C. statute limit the period for providing equivalent coverage to fifty-two weeks and allow the employer to obtain reimbursement from a special fund for the cost of the health insurance. 37 D.C. Reg. 6890 (D.C. Code § 36-307(a-1)(3)(5))(RA1). Under section 31-284b, Connecticut employers must provide equivalent coverage for as long as the employee is eligible to receive workers' compensation. In the case of employees like Judy Prevost, who does not claim to be totally disabled, the employer's obligation

respondents' ultimate misconception, both laws would be valid simply because neither requires employers to provide equivalent coverage through their ERISA-covered plans.

Piggyback laws, such as section 31-284b and the District of Columbia's new statute, impose real financial and administrative costs on sponsors of ERISA-covered plans.[14] By reviewing the Second Circuit's decision in this case, this Court can reassert the Congressional goal of national uniformity in benefit plan regulation, and stem the growing tide of state regulation that will erode federal protection of ERISA-covered plans and their sponsors.

(footnote continued)
can last for several years. *See* Conn. Gen. Stat. § 31-284b(d)(1989)(Pet. App. at A59)(providing that the state second injury fund will assume payment of coverage after 104 weeks of eligibility for workers' compensation only with respect to employees who are totally disabled).

[14] The administrative costs alone are not insubstantial. For example, under the D.C statute, which does not allow reimbursement of administrative costs, health insurance benefits are based upon the coverage afforded at the time the employee became eligible to receive workers' compensation benefits. 37 D.C. Reg. 6890 (D.C. Code § 36-307(a-1)(4))(1990). Thus, employers who change the terms of their health coverage must continue to provide coverage to some employees under the terms of the former plan.

CONCLUSION

For the foregoing reasons and those set forth in the petition, this Court should grant its Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this matter.

Respectfully submitted,
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APPENDIX TO PETITIONER'S REPLY BRIEF

37 D.C. Reg. 6890
(D.C. Code § 36-307(a-1))(1990)

(a-1)(1) Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this act.

(2) For purposes of this subsection the phrase "eligible to receive" means:

(A) An employee is away from work due to a job related injury for which the employee has filed a claim for workers' compensation benefits under this act; or

(B) An employer has knowledge of a job related injury of an employee who is away from work due to the job related injury pursuant to which workers' compensation benefits may become due under section 16.

(3) The provision of health insurance coverage shall not exceed 52 weeks and shall be at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits.

(4) Except as provided in paragraph (3) of this subsection, an employer shall pay the total cost for the provision of health insurance coverage during the time that the employee receives or is eligible to receive workers' compensation benefits under this act, including any contribution that the employee would have made if the employee had not received or been eligible to receive workers' compensation benefits.

(5) An employer shall be reimbursed for the provision of health insurance coverage required by this subsection from the special fund

established in section 41. If an employer fails to provide health insurance coverage and an employee subsequently procures the insurance coverage and receives reimbursement for the procurement of insurance coverage from the employer pursuant to subsection (d) of this section, the employer shall be reimbursed from the special fund only for the amount that the employer would have paid for the coverage if the employer had provided the coverage.